There are dicta in numerous cases to the effect that under this statute the act of testifying wipes out the offense completely as far as concerns the witness,[4] affording an immunity even broader than that provided by the Constitution, which merely provides against incriminating testimony given under compulsion; but never before, apparently, has the question been directly involved in a decision. In the federal case under consideration Judge Humphrey repeats the sweeping dicta of previous cases, contending for the immunity even where the witness was under no compulsion[5] and when his testimony was not self-criminatory, and refuses to sustain the prosecution. In the two Wisconsin cases the prosecution is supported on the ground that the immunity statute was intended to be only an equivalent for the fifth amendment, and therefore should be confined to cases of incriminating evidence obtained by compulsion.

Judge Humphrey's conclusions are the result of a literal application of the language of the statute, together with an assumption that the primary object of Congress in its enactment was to obtain information as a basis for regulative legislation rather than for purposes of prosecution. However this last may be, a consideration of the line of statutes culminating in that of 1893 indicates that the primary object of Congress was simply to provide an immunity sufficient to satisfy the constitutional requirements as laid down by the supreme court in Counselman *v.* Hitchcock. Now, although this case does contain statements to the effect that, in order to be constitutional, an immunity clause must protect the witness from any subsequent prosecution, these statements seem to have been made in contemplation of a witness offering self-criminating testimony under compulsion. Moreover, in the statute itself, though the words actually granting the immunity from prosecution are without qualification, they immediately follow the provision that the witness shall not be *excused* from testifying (thus implying compulsion), on the ground that such testimony may tend to *criminate* him. There is warrant, therefore, for the contention, in one of the Wisconsin cases, that the clause granting immunity should be read as qualified by the conditions of compulsion and self-crimination.[6] Finally, if the replies of the witness not only lack all self-criminatory character, but are in addition merely negative in effect, there is authority for the contention that they do not form testimony at all, thus not falling within the literal statutory requirements;[7] and in any event the result of granting immunity in such cases would be so clearly contrary to the spirit of the enactment as to justify a different construction.[8]

Conspiracy to Commit a Crime Requiring Plurality of Actors. — When the concurrence of two persons is necessary for the commission of a crime, — bigamy or adultery, for example, — the agreement to commit the crime is said to form part of the crime itself and not an independent conspiracy.[1] In such a case combination, which is the gist of conspiracy, is

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[4] See Brown *v.* Walker, 161 U. S. 591.
[5] See People *v.* Sharp, 107 N. Y. 427, *accord.*
[6] *Cf.* United States *v.* Price, 96 Fed. Rep. 960.
[7] *Re* Edwards, 58 Ia. 431.
[8] Church of the Holy Trinity *v.* United States, 143 U. S. 457.

[1] Shannon *v.* Commonwealth, 14 Pa. St. 226; Miles *v.* State, 58 Ala. 390; see 2 Whart., Crim. L., 10 ed., § 1339.

not in aggravation of the offense, but essential to it; and doubtless, therefore, such an agreement, plus an act in furtherance of the crime, would constitute a mere attempt.[2] The most recent application of this principle was to the giving and taking of a rebate. *United States* v. *Guilford et als.*, 38 Chi. Leg. N. 411 (Dist. Ct., S. D. N. Y.). In this case an indictment was brought under a federal statute[3] which provided that if two or more persons conspired to commit an offense against the United States, and if one or more of the parties did any act to effect the object of the conspiracy, all of the parties should be liable to fine, imprisonment, or both. The defendants had not only agreed to give and take rebates, but had actually given and taken rebates, an offense against the United States punishable only by fine at the time the defendants committed it.[4]

The agreement between the giver and the taker of a rebate, since concert of action between these two is indispensable to the commission of the offense of rebating, may be admitted not to constitute an independent conspiracy; but from this the conclusion does not follow that an agreement between three takers and two givers, as in this case, is not a conspiracy; and still less does this follow when to these five persons are added two more, who were go betweens and agents both for the receivers of the rebates and for certain outsiders who shared in the benefits of the transaction. To hold, as the court does, that the agreement between these seven men was not a conspiracy, seems an extreme application of the principle which has been adduced from the idea of plurality of actors. The understanding between one giver and another, between one receiver and another, and between all of these and the two agents, is not that sort of agreement which simply makes possible the act of giving and taking, but is a complete, independent, and formidable conspiracy. The court relies somewhat on the fact that only the givers and the receivers of the rebate were indicted; but the prosecution is not bound to indict all the conspirators, nor any particular conspirator.[5] The court objects also that under this indictment the defendants are liable to imprisonment, whereas Congress has provided for the imposition of only a fine for the actual giving and taking of rebates. But the prosecution was for the distinct offense of conspiracy, not for the crime which was the object of the conspiracy; and, under the same statute, certain conspirators who failed to accomplish the purpose of their combination have been held liable to punishment more severe than could have been inflicted had they committed the contemplated crime and been indicted therefor.[6] The defendants in the principal case ought not to be better off because they have accomplished their object. Further, no question of merger can arise here, because, whatever may be said for the doctrine of merger where the conspiracy is a misdemeanor and the object thereof is a felony, that doctrine has no application to this case where both are misdemeanors.[7] Nor does it seem that the language of the Elkins' Act[4] — which made it unlawful for any person or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate — will warrant a construction that prevents the agreement of the seven persons involved in this case from being indicted and punished as a conspiracy.[8]

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[2] *Cf.* 2 Bish., Crim. L., 8 ed., § 184, *n.* 4.
[3] U. S. Rev. Stat., § 5440; 1 U. S. Rev. Stat. Supp. 264.
[4] 32 U. S. Stat. at L. 847, Elkins' Act.
[5] Heine *v.* Commonwealth, 91 Pa. St. 145.
[6] Clune *v.* United States, 159 U. S. 590.
[7] Berkowitz *v.* United States, 93 Fed. Rep. 452.
[8] United States *v.* Thomas *et al.*, 145 Fed. Rep. 74.